No. 82-1071

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, ET AL.,
PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN SUPPORT OF REVERSAL

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ROBERT S. GREENSPAN
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

HARVARD SPIGAL
Acting General Counsel

JAMES O. LUCE
Acting Assistant General Counsel

Bonneville Power Administration
Portland, Oregon 97208

LARRY R. ROWE
Attorney

Department of Energy
Washington, D.C. 20585

QUESTION PRESENTED *

Whether the court of appeals, in determining that the Bonneville Power Administration "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravened established principles of judicial review and imposed a judicially created plan of power allocation in place of the carefully crafted statutory plan intended by Congress.

---

* The federal respondents include: Peter Johnson, Administrator of the Bonneville Power Administration, Donald Paul Hodel, Secretary of the Department of Energy, and the United States of America. Petitioners are: Aluminum Company of America, Georgia-Pacific Corporation, Pennwalt Corporation, Reynolds Metals Company, Intalco Aluminum Corporation, Crown Zellerbach Corporation, Hanna Nickel Smelting Company, Alumax Pacific Corporation, Kennecott Corporation, ARCO Metals Company, Kaiser Aluminum & Chemical Corporation, Pacific Carbide & Alloys Company, Oregon Mettallurgical Corporation, and Martin-Marietta Aluminum Company. The other respondents are: Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, Public Utility District No. 2 of Grant County, City of Seattle, City Light Department, City of Tacoma, Department of Public Utilities, Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, Tillamook Peoples' Utility District, Eugene Water & Electric Board, Public Power Council, Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power and Light Company, Montana Power Company and Idaho Power Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Statutes and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1071

ALUMINUM COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN SUPPORT OF REVERSAL

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-14) is reported at 686 F.2d 708. The decision of the Administrator of the Bonneville Power Administration is reported at 46 Fed. Reg. 44340.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1982. The court of appeals' opinion was amended on September 7, 1982, and a petition for rehearing en banc was denied on September 27, 1982. The petition for a writ of certiorari was filed on December 23, 1982, and was granted on March 28, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. (Supp. V) 839 *et seq.*, are set out at Pet. App. B-1 to B-75.

STATEMENT

1. Since the enactment of the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*, the federal government has provided low-cost hydroelectric power to public utilities, federal agencies, investor owned utilities ("IOUs") and direct service industrial customers ("DSIs" or "industrial customers") in the Pacific Northwest.[1] Although the 1937 Act directed the Administrator of the Bonneville Power Administration ("BPA")[2] to "give preference and priority to public

[1] Federally-generated hydroelectric power is usually much less expensive than thermal electricity, and the cost differences have tended to increase in recent years. Factors contributing to the difference include longer amortization of dam facilities at lower interest rates, the absence of any need to compensate investors for risk, and the sharp escalation in the prices for fossil fuels and nuclear facilities during the last decade.

[2] Initially, the BPA Administrator was appointed by, and responsible to, the Secretary of the Interior (16 U.S.C. 832a(a)). Today, pursuant to the Department of Energy Organization Act, 42 U.S.C. (Supp. V) 7101, the Secretary of Energy acts "by and through" BPA but BPA is "preserved as [a] separate and distinct" organizational entity within the Department (42 U.S.C. (Supp. V) 7152(a)(2)). There are four other such regional power marketing agencies that operate under the supervision of the Department of Energy. *Ibid.* The others are the Alaska Power Administration, the Western Area Power Administration, the Southeastern Power Administration, and the Southwestern Power Administration. The Tennessee Valley Authority ("TVA") is a corporation with quasi-governmental powers (16 U.S.C. 831,

bodies and cooperatives," 16 U.S.C. 832c(a),[3] for many years BPA had sufficient hydroelectric resources to satisfy all preference customers and also to make substantial sales to nonpreference customers. At first, BPA's contracts with nonpreference IOUs and industrial customers[4] provided for BPA to supply their full contractual power requirements on a "firm," non-interruptible basis.[5] That situation

---

831c). Unlike the other power marketing entities, TVA does not operate under direct Executive supervision with respect to sales of power. BPA is distinguished from TVA and the other power marketing agencies in that it shares some but not all of these quasi-governmental powers (16 U.S.C. 838, 838i). BPA is also the largest of the power marketing agencies and sells at wholesale more than 50% of all power sold in the four state area of Washington, Oregon, Idaho, and Montana. All five power marketing agencies and TVA market power pursuant to various statutes that provide for preference to public bodies and cooperatives.

[3] The 1937 Act defined "public bodies" as "[s]tates, public power districts, counties, and municipalities, including agencies and subdivisions * * * thereof"; "cooperatives" were defined as "nonprofit-making * * * organizations of citizens supplying * * * members with any kind of goods, commodities, or services as nearly as possible at cost." 16 U.S.C. 832b. These entities are referred to as "preference customers."

[4] "Direct service industrial" customers are end users that purchase power directly from BPA, rather than through a utility. The DSIs served by BPA produce *inter alia* approximately 30% of the nation's aluminum, and 100% of the domestically mined nickel.

[5] "Firm" power is energy BPA can reliably expect to produce from predictable streamflow conditions. "Nonfirm" power is energy in excess of amounts that can reliably be expected; it is provided only when such excess exists, is not guaranteed, and is subject to interruption to protect service to firm obligations. See 16 U.S.C. (Supp. V) 839a(17). "Surplus" power is power that BPA is authorized to sell after

changed with respect to the DSIs in 1948, when BPA modified its industrial sales policy to require DSIs, where feasible, to take some nonfirm power together with firm power. G. Norwood, *Columbia River Power for the People, A History of Policies of the Bonneville Power Administration* 161 (1981). This modification recognized the fact that nonfirm service could be of significant operational benefit by enabling BPA to interrupt the nonfirm portion of the DSI load to provide reserves for other customers.

The situation changed even more significantly in the 1970's. By that time there were no remaining environmentally acceptable sites for additional federal hydroelectric projects. Increasing population and per capita consumption created competing demands for BPA service and eventually reached the point where projections showed that preference customers would soon require all of BPA's power, thus threatening to cut off all other customers. See H.R. Rep. No. 96-976 (Pt. I), 96th Cong., 2d Sess. 23-26 (1980); Pet. App. D-61 to D-63. In light of these changed circumstances, BPA announced that all firm power sales to IOUs would cease in 1973 (Pet. App. D-61). In 1975, BPA's contracts with DSIs specified that 25% of the power available to the DSIs (the so-called "top" or "first" quartile) would be nonfirm and subject to interruption "at any time." See Pet. App. N-5. Further, BPA advised the DSIs that, as their contracts expired during the 1981-1991 period, they were not likely to be renewed. BPA also found that it could not meet all of the requests by entities entitled to

---

having met the contractual entitlements (established in 16 U.S.C. (Supp. V) 839c(b) and (d)) of the IOUs, and the industrial and preference customers. 16 U.S.C. (Supp. V) 839c(f). Surplus power is sold subject to preference. 16 U.S.C. (Supp. V) 839a.

preference. Accordingly, in 1976, the agency issued "Notices of Insufficiency" to its existing preference customers, informing them that BPA could not satisfy preference customer load growth after July 1, 1983. Pet. App. D-62.

An additional problem also emerged. The BPA power that was available was not being distributed in a manner that benefited consumers evenly throughout the Pacific Northwest. While 80% of the consumers in Washington had access to BPA power because they were served by preference customers, only 20% of the consumers in Oregon had access to BPA power. *Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, 9664, and 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess., Pt. III, 9 (1977) (hereinafter "*House Hearings on H.R. 9020*") (statement of Gov. Straub); *id.* Pt. IV, at 4 (statement of Rep. Weaver). In 1977, a consumer in Vancouver, Washington, paid $10 for 1,000 kilowatt hours of BPA electricity; in Portland, Oregon, a homeowner paid $27 for the same amount of electricity. *House Hearings on H.R. 9020*, Pt. III, *supra*, at 4 (statement of Gov. Straub). Oregon passed legislation to create a new state agency as a preference entity and the City of Portland commenced litigation in an effort to alter BPA contract sales patterns. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 133 (statement of Gov. Ray). In the face of this escalating competition for increasingly scarce resources the Northwest was "poised for regional civil war—an interstate battle over the allocation of low-cost Federal power." *Ibid.* (remarks of Gov. Ray).

2. To "avoid endless and unproductive litigation" and "a prolonged period of economic uncertainty

* * *," citizens in the Pacific Northwest held scores of meetings in 1977. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 145 (remarks of Gordon Culp, Counsel, Pacific Northwest Utilities Conference Committee) and 301-332 (partial list of meetings). These meetings led to a series of bills considered by the 95th and 96th Congresses. In 1980, after extensive deliberation, Congress passed the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. (Supp. V) 839 *et seq.* (the "Act" or "Regional Act"). The Act provided for future cooperation in the region by joint federal/state comprehensive planning and expanded BPA powers to acquire resources and encourage conservation. 16 U.S.C. (Supp. V) 839b and 839d. The Act also sought to forestall the battle over the allocation of low-cost federal power by expressly providing that various classes of customers are entitled to BPA power.[6]

a. Under the Regional Act, BPA must sell its power to every preference customer and investor-owned utility "[w]henever requested," but BPA's obligations are limited to the amounts needed in excess of the requestor's own generation capability and its contractually-obtained capability to meet its firm load. 16 U.S.C. (Supp. V) 839c(b)(1). The purchaser must continue using its own resources to serve its load to the extent possible; if these resources are prematurely retired, they must nevertheless be treated by BPA as if they are still being used. Thus, the preference customer's entitlement under 16 U.S.C. (Supp. V) 839c(b) may not be used to allow the

[6] In addition to the preference customers, DSI's and IOU's, to whom it is required to sell power, BPA is also authorized to sell power to certain federal agency installations. 16 U.S.C. (Supp. V) 839c(b)(3). Federal purchases will not be discussed in this brief.

preference customer to close down its own facilities or terminate its other purchases. Nor does the Act empower a preference customer to diminish the statutory entitlements of other customers. 16 U.S.C. (Supp. V) 839c(b) and (d). The preference customer does, however, have an undisputed first claim to all "surplus" power, that is, power in excess of the statutory entitlements of other customers. 16 U.S.C. (Supp. V) 839c(f).

b. IOUs are entitled to have BPA meet their full net firm requirements and to participate in the federal power program under an "exchange" arrangement (16 U.S.C. (Supp. V) 839c(b)(1) and (c)(1)).[7] Such utilities may "swap" their own power, at their average system cost, for an equal amount of lower-priced federal power from BPA. Whenever requested to do so, the Administrator must offer an exchange sale of an equivalent amount of BPA power for resale to the utility's residential users. 16 U.S.C. (Supp. V) 839c(c)(1).[8] The cost benefits to the region's utilities of this residential exchange program are passed on directly to residential consumers. 16 U.S.C. (Supp. V) 839c(c)(3). See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 60; Pet. App. D-120 to D-121. BPA is to recoup its cost of participating in the utility exchange program by charging higher

---

[7] The exchange program is not limited to IOUs, but is available to any "Pacific Northwest electric utility," 16 U.S.C. (Supp. V) 839c(c)(1). As a practical matter, however, the exchange program has been utilized almost exclusively by IOUs.

[8] BPA's obligations in the residential exchange program began at 50% of the residential load. It is being "ramped in" to 100% of the residential load by 1985. 16 U.S.C. (Supp. V) 839c(c)(2).

prices to the DSIs. See 16 U.S.C. (Supp. V) 839e(c)(1).[9]

c. In return for paying higher prices, the DSIs were afforded certain benefits. Congress determined that sales to the DSIs should continue and BPA was required to "offer * * * to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" 16 U.S.C. (Supp. V) 839c(d)(1)(B). Congress required, however, that some part of these sales would be interruptible: "Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region." 16 U.S.C. (Supp. V) 839c(d)(1)(A).[10]

---

[9] Under the Act, the DSIs must finance the bulk of the residential exchange program. Preference customers and IOUs pay "a rate or rates of general application" designed to recover the *costs* attributable to their service. 16 U.S.C. (Supp. V) 839e(b). But, the DSIs no longer purchase federal hydroelectric power at cost. Prior to July 1, 1985, they pay a rate that includes the cost of the resources used to serve the DSIs and the net cost of the exchange program to BPA, to the extent such costs are not recovered through rates for other power sales. 16 U.S.C. (Supp. V) 839e(c)(1)(A). Thereafter, the DSIs will pay a rate "which the Administrator determines to be equitable in relation to the retail rates" paid by industrial purchasers of power from preference customers. 16 U.S.C. (Supp. V) 839e(c)(1)(B); see also 16 U.S.C. (Supp. V) 839e(c)(2). It was anticipated that the price paid by the DSIs for BPA power would immediately triple. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 177 (remarks of Edgar Kaiser).

[10] During the legislative process, the Chairman of the House Subcommittee on Water and Power Resources requested an analysis of the DSI rates and revenues projected under the

d. Neither BPA's production nor its customers' demands are amenable to precise prediction. These interrelated power sales operate in a complex grid with federal, state, local and private participation. Among other variables that affect the level of power produced by BPA and the power needed in the region are weather conditions, such as annual changes in rainfall and snowmelt, as well as a host of economic

---

proposed statute. BPA's Administrator responded by letter on August 19, 1980 (Pet. App. I-1 to I-23) explaining, in an attachment, how BPA would serve the DSI load. Half of the load could be interrupted to serve as reserves (*id.* at I-23):

> Approximately twenty-five percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional twenty-five percent of the DSI load will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

The House Interior Committee's Report, issued less than one month later, adopted this language verbatim (Pet. App. E-106 to E-107). The House thereafter voted in favor of the bill, as pertinent here, in the form reported; and the Senate voted to adopt the House version of the legislation. During the Senate debate, key leaders (Senators Jackson and McClure, the former and present Chairmen of the Senate Committee on Energy and Natural Resources) adopted the House Interior Committee's Report. 126 Cong. Rec. S14691, S14698 (daily ed. Nov. 19, 1980). Thereafter, Section 7(c) of the new DSI contracts incorporated the House Interior Report language virtually verbatim (Pet. App. H-1).

factors. Recognizing this reality, Congress took several steps to deal with potential shortages.

Initially, Congress "deemed" BPA "to have sufficient resources" to enter into the contracts required by the Act. 16 U.S.C. (Supp. V) 839c(g)(7). And BPA was given new authority to acquire resources to meet increased demand. 16 U.S.C. (Supp. V) 839d. But even so, provision was made for unanticipated shortages. Thus, the Administrator's obligation to offer to sell power to meet the IOUs' net firm requirements (Section 839c(b)(1)) is tempered by Section 839c(b)(2), which authorizes the Administrator to restrict those obligations "in accordance with Section 5(a) of the Bonneville Project Act of 1937," 16 U.S.C. 832d, which provides, in turn, that BPA contracts may be cancelled on five years' notice "if in the judgment of the administrator any part of the electric energy * * * is likely to be needed to satisfy the requirements of the said public bodies and cooperatives." So, also, contract obligations to DSIs were made subject to interruption when firm load requirements of BPA customers were not satisfied. 16 U.S.C. (Supp. V) 839c(d)(1)(B).

At the same time, preference customers were accorded a first claim on any uncommitted surplus power that might be available after the statutory entitlements of other customer classes were satisfied.[11] 16 U.S.C. (Supp. V) 839c(f).

---

[11] The "amount of power" BPA sells to DSIs cannot be increased unless additional "* * * reserves are required for the region's *firm* loads * * *" and the Regional Planning Council agrees that the sale of additional power to the DSIs is a cost effective way to obtain such reserves consistent with the Council's plan. 16 U.S.C. (Supp. V) 839c(d)(3) (emphasis added).

3.a. Congress directed the Administrator of BPA to commence and complete negotiations for the initial long-term contracts with preference customers, IOUs, and DSIs, and to issue simultaneous offers within nine months of the effective date of the Regional Act (December 5, 1980). 16 U.S.C. (Supp. V) 839c (g)(1). BPA implemented the Regional Act by conducting contract negotiations in public and permitting public comment on the negotiations. See Notice of Public Participation in Negotiations of Initial Long-Term Power Sales and Certain Other Contracts, 46 Fed. Reg. 18331 (1981).[12] The public comment

[12] BPA recognized that the issues involved in the sale of hydroelectric power are technical and unfamiliar to the average citizen. For that reason, BPA took exceptional steps to inform and encourage public participation. On December 1, 1980, before the Regional Act became effective, BPA mailed to 8,000 persons and organizations a summary of the legislation and announced four technical meetings to be held in December. On December 5, 1980, BPA wrote to customer groups and individuals, including environmental and public interest groups, local governmental bodies and Northwest Indian Tribes, announcing the time and place of these meetings. On January 5, 1981, BPA issued a press release announcing a series of 26 town hall meetings between January 8 and 22.

On January 23, 1981, BPA held an organizational meeting at which it decided to implement the Act by publicly negotiating prototype contracts for "(1) Power Sales Contracts for Nonscheduling Customers and Scheduling Customers (Computed Demand); (2) Residential Load Purchase/Sale Contracts (Exchange Contracts); (3) Direct-Service Industrial Power Sales Contracts; (4) Conservation Contracts; (5) Purchase of Resource Capability and Resource Plus Preconstruction Investigation Contracts; (6) Purchase of Output, Including Short-Term Power Purchase; (7) Service and Exchange; and (8) Resource Option." 46 Fed. Reg. 18332. BPA issued weekly notices of the negotiating sessions, and

and negotiation sessions yielded draft contracts that were summarized in the Federal Register. Draft Prototype Power Sales Contracts Interpreting Policy Provisions of Pacific Northwest Electric Power Planning and Conservation Act: Publication of Summary of BPA's Proposed Contract Provisions and Request for Public Comment, 46 Fed. Reg. 31238 (1981). Additional public comments were sought; public meetings were held in Seattle, Spokane, Portland, Boise, and Missoula. *Ibid.* BPA also prepared a "report on the environmental considerations that are associated with the issues and alternatives that have been identified during the contract negotiations," which was made available for comment (*id.* at 31239).

In the published notice, the agency stated that each DSI was entitled to the "amount of power to which it is presently entitled under the [1975 Industrial Firm] contracts * * *." 46 Fed. Reg. 31245 (1981). With respect to "BPA Restriction Rights" the notice stated (*ibid.*; emphasis added):

> The DSI contracts are required to provide reserves to protect BPA's firm obligations. These reserves are provided through contract rights *to interrupt or withdraw power otherwise delivered to the DSIs. The restriction rights may not be exercised for any purpose other than the protection of all BPA firm obligations. Except to the extent of such restriction rights, BPA's contractual obligations to the DSIs are generally identical to its obligations to other customers.*

---

made all documentation available. On April 24, 1981, BPA published a list of discussion topics and announced two additional public meetings for May. See, Notice of Public Meetings To Receive Comments on Contract Negotiations Matters; Request for Agenda Items, 46 Fed. Reg. 23287-23289.

In general, the comments received by BPA were consistent with this understanding. For example, the Intercompany Pool, an association representing IOUs, stated, (COR XXVI at 6921-6922): [13]

> * * * Congress has given DSI top quartile new status as a non-firm obligation of BPA, at a higher level than either public agency or ICP markets for secondary. And apparently Congress requires BPA to serve DSI top quartile directly as if it were a firm obligation * * *.

b. On August 29, 1981, BPA issued its Final Action Concerning Power Sales and Residential Exchange Contracts (46 Fed. Reg. 44340 (1981)). With respect to the "top quartile", BPA retained its right to interrupt sales to the DSIs at any time and for any reason, but only in order "to protect Bonneville's ability to meet its Firm Obligations * * *." Contract Offer Section 7(c), 46 Fed. Reg. 44381 (1981); Pet. App. H-1. BPA would not, under the contract offer, interrupt deliveries to the DSIs "for the purpose of selling nonfirm energy * * *" (46 Fed. Reg. 44382 (1981); Pet. App. H-1), nor would BPA plan for, or acquire, any resources for "top quartile" deliveries. Contract Offer Section 8(a)(1), 46 Fed. Reg. 44385 (1981). In describing these terms of sale, the Administrator noted BPA would provide "a power quantity with firm characteristics, while not installing resources to meet it on an absolutely firm basis." *Id.* at 44348. The Administrator justified these terms of sale on the plain language of the Regional Act, the

---

[13] "COR" refers to "Contract Official Records," so designated by BPA to distinguish this administrative record from other proceedings triggered by the Regional Act. The COR was filed by the government in the court of appeals pursuant to Fed. R. App. P. 17.

Act's legislative history, and the Act's operational policies.

i. The Administrator's decision began with reference to Section 5(d)(1)(B) of the Act (16 U.S.C. (Supp. V) 839c(d)(1)(B)), which requires the agency to offer each existing DSI "an amount of power equivalent" to the 1975 contracts. With respect to the terms of sale of that power, including the "top quartile" (which had been freely interruptible in the 1975 contracts), the Administrator noted that Section 5(d)(1)(A) of the Act (16 U.S.C. (Supp. V) 839c(d)(1)(A)) indicates that sales to the DSIs are "[to] provide a portion of the Administrator's reserves for firm power loads * * *." Section 3(17) (16 U.S.C. (Supp. V) 839a(17)) defines "reserves" as "the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers * * *." The Administrator concluded from these passages that "service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy." 46 Fed. Reg. 44348 (1981).

ii. To the extent that there remained any ambiguity as to whether Congress intended the reserve to come from the DSIs' "quasi-firm" "top quartile", the Administrator held that such ambiguity should be resolved by examining the legislative history (46 Fed. Reg. 44348 (1981)):

> * * * The Senate Energy Committee Report directs BPA to plan and develop " 'firm' resources under critical streamflow conditions to carry 75 percent of the total DSI requirement," with the additional 25 percent, or "top quartile," to "be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm." S. Rep. No. 272, 96th Cong., 2d Sess. 59 (1979). In

addition, the House Interior Committee Report states that:

> Sales to existing DSI's are required to provide a portion of BPA's power system reserves * * *. The DSI's will provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve which may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region * * *. An additional 25 percent of the DSI load will be treated as firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads . . . .

Senators Jackson and McClure, the past and present Chairmen of the Senate Committee on Energy and Natural Resources, have concurred that the House Interior Committee Report reflects the accurate position of the Senate on the "reserves" question. See 126 Cong. Rec. 14691 (daily ed. Nov. 19, 1980) (remarks of Senator Jackson) and *Id.* at 14698 (remarks of Senator McClure).

iii. The Administrator also indicated that the terms offered to the DSIs would enhance BPA's ability to implement policies underlying the Regional Act. Improved "first quartile" revenues (because of the higher rates paid by DSIs) were expected to increase BPA receipts that would be used to finance the residential exchange program. These sales would also serve to "alleviate the need for BPA to acquire additional expensive generating resources for reserves" (46 Fed. Reg. 44348 (1981)). In the con-

cluding paragraphs of his decision, the Administrator explained that the adopted contract provisions would provide the DSIs "with the power quality required by law with minimum costs and minimum adverse impacts on other customer groups" (*ibid.*).

4. Shortly after the Administrator's decision and the execution of new DSI contracts, a group of preference customers petitioned for review in the United States Court of Appeals for the Ninth Circuit.[14] As pertinent here, the preference customers alleged that the contract offers to the DSIs, particularly Sections 7(c), 8(a)(2) and 8(b),[15] violated the priority accorded to public bodies and cooperatives in the Bonneville Project Act as brought forward by Sections 5(a) and 10(c) of the Regional Act (16 U.S.C. (Supp. V) 839c(a) and 839g(c)), and provided the DSIs with a greater "amount of power" than their 1975 contracts, in violation of Section 5(d)(1)(B) of the Regional Act (16 U.S.C. (Supp. V) 839c(d)(1)(B)).

The court of appeals rejected BPA's interpretation of the Act and voided the contract provisions that ensured that the "top quartile" would be available as a reserve to meet BPA's firm power loads. The court concluded that, because the sales of nonfirm power

---

[14] The BPA contract offers are final agency actions subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701-706. 16 U.S.C. (Supp. V) 839f(e)(1) and (2). "Suits" brought to challenge either the constitutionality of the Regional Act or the validity of decisions taken pursuant thereto may be filed "in the United States court of appeals for the region" within 90 days. 16 U.S.C. (Supp. V) 839f(e)(5). Review of the agency's final decision is confined to the administrative record. 16 U.S.C. (Supp. V) 839f(e)(2).

[15] See Contract Offer Sections 7 (Restriction of Deliveries) and 8 (Operation), 46 Fed. Reg. 44381-44388 (1981).

under the 1975 contracts were contingent upon availability and upon public utilities' requests for nonfirm power, the "top quartile" had not been "allocated" to the DSIs. Hence, the DSIs were not "entitled" to this amount under the 1975 contracts and it could not be offered to them now. Pet. App. A-6 to A-8.

In addition, the court held that, even if BPA correctly discerned Congress' intent to allocate the nonfirm power to the DSIs, BPA's interpretation was unreasonable insofar as it protected that allocation against a preference customer's demand for nonfirm power. Pet. App. A-8.

SUMMARY OF ARGUMENT

1. This case presents a classic instance of judicial overreaching into the administrative process. Virtually every factor this Court has articulated as a basis for deferring to agency decisionmaking is present here: The subject is particularly technical and complex; the agency has longstanding expertise in the area; the statute is new and was, immediately following its enactment, interpreted by the agency charged with implementing its provisions. As the court of appeals observed (Pet. App. A-10 & n.7), the agency's position finds "[s]upport" in the legislative history. Indeed, this concession by the court is an understatement. BPA was intimately involved in the legislative process. When asked by the Chairman of the House Subcommittee on Water and Power Resources to explain how the proposed bill would operate, BPA did so. This explanation was repeated virtually verbatim in the House Report. And, finally, following passage BPA proceeded to do precisely what it had informed Congress it would. Such evi-

dence of fidelity to congressional intent is clear and persuasive and, under all recognized principles of judicial deference, requires affirmance of the agency's statutory construction.

2. In addition to Congress' express ratification of BPA's treatment of the DSIs, the contracts at issue here are consistent with the legislative history on a more general basis. When Congress interceded to avert a "regional civil war" over access to low-price federal power it prescribed a plan of allocation designed to assure fair access to all competing groups. The result was a statute that specifies with extraordinary particularity how preference customers and nonpreference customers, including the DSI petitioners, are to be treated. BPA was required to offer new contracts to its existing DSI customers, and those contracts were to provide for the sale of an amount of power equivalent to the amount to which the DSIs were entitled under existing contracts. In the decision at issue here, BPA did precisely that. The court of appeals, however, has confused the *amount of power*, which is in fact identical under the old and new contracts as the statute requires, with the *terms of power sale*, which have been changed, also in accordance with the Regional Act.[16] When the new contracts are properly understood, it is clear that BPA has acted in a manner consistent with congressional intent.

3. The new DSI contracts would also promote the policies underlying the Regional Act. The carefully crafted statutory plan of allocation creates a delicate

---

[16] "Terms of power sale" refers to BPA's ability to restrict the load; "amount of power" refers to the fact that BPA has a commitment to serve the full load with the "amount of power" specified in the 1975 contracts.

balance. In particular, the residential exchange program, which permits IOUs to obtain low-price power for residential customers, depends upon BPA receiving increased revenues from sales to DSIs. Because IOUs may "swap" their own higher-priced power for BPA power, the program will inevitably result in increased costs for BPA. Indeed, in the first year (fiscal 1982) following passage of the Regional Act, the net cash benefit of this exchange to the IOUs' residential customers was $216,592,967. This same figure, of course, represents the amount of loss BPA incurred in the exchange. When these costs are projected over the life of the DSIs' 20 year contracts, BPA estimates an aggregate cost of $10 billion. Under the Act, this shortfall is to be funded principally by sales to DSIs (16 U.S.C. (Supp. V) 839e (c)(1)(A)). And a key incentive for the DSIs to terminate their existing contracts and replace them with the new contracts mandated by the Regional Act was the improved terms of power sale the Act describes. The benefits Congress provided to the DSIs in improving the quality of power purchased (by limiting the circumstances in which the flow of power could be interrupted) has been negated by the decision below.

The adverse consequences of this decision affect the government as well as the DSIs. By disrupting the balance mandated by statute, the court of appeals' decision threatens to deprive BPA both of the revenues designed to underwrite the residential exchange program and the flexibility to use the DSIs "top quartile" as reserves for BPA to serve its customers' firm loads. Without this reserve capacity prescribed in the statute, BPA may be required to acquire additional generation capacity to serve as reserves, a

step that would not only incur costs Congress did not intend, but would also defeat the Regional Act's encouragement of conservation.

ARGUMENT

THE CONTRACT OFFERS FOR DIRECT SERVICE INDUSTRIAL CUSTOMERS REFLECT A REASONABLE INTERPRETATION OF A COMPLEX, TECHNICAL STATUTE THAT IS CONSISTENT WITH PREFERENCE REQUIREMENTS, IS STRONGLY SUPPORTED BY THE LEGISLATIVE HISTORY, AND ADVANCES IMPORTANT POLICY GOALS

A. The Court Of Appeals Failed To Accord Appropriate Deference To BPA's Construction And Implementation Of The Regional Act

This area of federal regulation is obviously quite complex. In enacting the Regional Act Congress specified with unmistakable precision the amounts of power that were to be allocated to each class of customers. Within this required allocation, Congress delegated to BPA responsibility for implementing the Act with broad discretion to determine the particulars of how power will be sold to each class of customer. We submit the court of appeals failed to accord appropriate deference to BPA's expertise. See *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 n.21 (1981); *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947). Although it noted that BPA's position finds "[s]upport" in the legislative history (Pet. App. A-10 & n.7)—a conclusion that should compel affirmance of the agency's decision—the court nevertheless supplanted the agency's interpretation with a judicially created plan of allocation.

The agency decision at issue here was made immediately following the Act's passage "by the men charged with the responsibility of setting its ma-

chinery into motion, of making the parts work efficiently and smoothly while they are yet untried and new," *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-668 (1980), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933), and is thus entitled to considerable weight. As this Court recently observed, "[w]e have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference," *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982). See also, *e.g.*, *E.I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). Accordingly, "[t]o uphold [the agency's decision], 'we need not find that [BPA's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). See *Mourning* v. *Family Publications Service*, 411 U.S. 356, 371-372 (1973). "We need only conclude that it is *a* reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20.

These principles are particularly compelling where, as here, the agency made major contributions to Congress' consideration of the statute[17] (*Zuber* v. *Allen*, 396 U.S. 168, 192 (1969)) and the terms of interruptibility contained in the contract provision at is-

[17] See note 10, *supra*; Pet. 14; 125 Cong. Rec. 22567 (1979) (remarks of Sen. Hatfield); 126 Cong. Rec. H9848 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell); COR I at 59, 189; COR II at 326, 497 (transcripts of technical meetings); COR VI at 1466.

sue were brought to Congress' attention and expressly approved. See note 10, *supra*; Pet. 14-15 & n.7; *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

The Ninth Circuit's rejection of BPA's interpretation cannot be reconciled with the review standards established by this Court. Here, the court has intruded upon the very complex area of the terms of hydroelectric power marketing.[18] The opinion below

---

[18] BPA operates the largest hydroelectric system in the United States. The Federal Columbia River Power System, for which BPA is the marketing agency, consists of 30 hydroelectric projects with a total installed capacity of more than 19 million kilowatts. BPA also markets the output from a 800,000 kilowatt steam plant and 30% of the 1,080,000 kilowatt Trojan nuclear plant. In short, BPA markets more than 50% of the electricity in the Pacific Northwest, a percentage which Congress assumed would increase under the Regional Act. The marketing effort is supported by BPA's ownership of the nation's largest network of long-distance, high-voltage transmission lines. See S. Rep. No. 96-272, 96th Cong., 1st Sess. 17 (1979); Pet. App. F-37 to F-38; H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 26; Pet. App. D-64 to D-65.

In fulfilling its marketing obligations, BPA must act in a manner that is consistent with the multiuse nature of hydroelectric projects, involving such purposes as flood control, irrigation, navigation, and recreation. Additionally, BPA must coordinate its activities with the operations of utilities with hydroelectric and thermal generation.

Given the complex nature of BPA's operation, it is apparent why Congress recognized and relied on BPA's expertise in drafting the bill and included provisions to assure that the agency's contracts would maximize the benefits of the system to the entire Pacific Northwest. S. Rep. No. 96-272, *supra*; Pet. App. F; H.R. Rep. No. 96-976 (Pt. 1), *supra*; Pet. App. D.

fails to recognize that both the 1975 contracts and the new contracts entitle the industrial customers to a stated "amount of power," and confuses that concept with the question of when the load can be interrupted. As such, the opinion—which relies almost exclusively upon incorrect technical characterizations at odds with the interpretation of the expert agency—does not faithfully execute this Court's holdings concerning review of agency statutory construction.

B. The Act And Its Legislative History Show That Congress Intended BPA To Serve The First Quartile Of The Direct Service Industrial Customers With Improved Interruption Provisions, Limited To Providing A Reserve For The Firm Loads Of Other Customers

Although the decision below has broader implications, the immediate controversy centers on the provisions of the new contracts offered to direct industrial customers that afford those customers a somewhat greater degree of protection against the demands of publicly-owned utilities and cooperatives. Specifically at issue is the so-called "top" or "first" quartile of power furnished to DSIs—the portion of their contract entitlement that is largely served by "nonfirm," or not wholly dependable, energy. It is common ground that this "top quartile" is subject to restriction or interruption when the power is needed to satisfy the "firm loads" of BPA's customers. The question here is whether, as the court of appeals held, the DSIs must also be required to give way—to the extent of this fourth of their contract entitlement—because preference customers, having received all the firm supply promised, want additional nonfirm power. In our submission, the Bonneville Power Administration was fully justified in declining to reach that result.

1. The court of appeals placed undue reliance on Section 5(a), 16 U.S.C. (Supp. V) 839c(a), which preserved the preference recited in the 1937 Act. While Congress retained the existing public utility preference, Section 5(a) and other language relating to preference must be understood in the context of the 1980 legislation. That section is not the entirety of the Act's provision of customer entitlements and, if read in isolation, will produce a result quite at odds with the legislative purpose. For, if Congress had intended to perpetuate the preference without modification, no further legislation was necessary; indeed, the entire 1980 statute would be redundant if it was intended to do nothing more than preserve the status quo under the 1937 Act. See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 36-37; Pet. App. D-80 to D-81. To accept the preference customers' view " 'would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947); see *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself").

As this Court recently observed in *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983) slip op. 10-11 (quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 184 (1857)):

> it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with the whole statute . . . and the objects and policy of the law* . . . .

The preference clause must therefore be analyzed and construed within the framework of the Regional

Act and against the background of the congressional purposes. The Regional Act was passed, in large part, to permit continued sales to nonpreference customers that otherwise would have been impossible.

In following the statutory directive to sell power to the DSIs, BPA also recognizes the continued vitality of the preference provision and the agency's interpretation will preserve it just as Congress intended. Under the 1980 Act, BPA is required to offer contracts with specific allocations of power to certain nonpreference customers, including DSIs. Once these commitments have been satisfied, any further energy generated by BPA ("surplus" energy) is available for sale in accordance with the preference. Section 5(f), 16 U.S.C. (Supp. V) 839c(f). Thus, the surplus will be offered first to public utilities in accordance with the preference. But the court of appeals' opinion would strip the nonpreference customers of their statutory entitlement to purchase non-surplus power by elevating the preference clause to a primacy Congress never intended. It was the threat that such an exercise of preference by public utilities would curtail sharply or eliminate BPA sales to other customers that led Congress to act. H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 36.

Congress was fully cognizant that the 1980 Act would modify the quality of power whose allocation would be governed by preference rights in the region served by BPA. See S. Rep. No. 96-272, 96th Cong., 1st Sess. 28 (1980); Pet. App. F-56 to F-57. Indeed, precisely because a change was made and some feared that the 1980 Act might be construed in a manner that would alter preference rights under other federal energy legislation affecting other regions of the country (Pet. App. D-76), the House Report stated

that there was no intention to "alter, diminish, abridge, or otherwise affect, either directly or indirectly, the preference provisions of *other* Federal [Power] laws." Pet. App. D-78, quoting Section 10 (c), 16 U.S.C. (Supp. V) 839g(c) (emphasis added). See also Pet. App. D-143.

2. Contrary to the view taken by the court of appeals, this is in no way inconsistent with the statutory directive that existing DSIs be offered "an amount of power equivalent to that which such customer is entitled under its contract dated * * * 1975." Section 5(d)(1)(B), 16 U.S.C. (Supp. V) 839c(d)(1)(B). The new contracts provide the DSIs with the same amount of power to which they were previously entitled. That the new contracts improve the *quality* of "top quartile" power, by limiting the circumstances of interruption, does not alter the fact that the DSIs were entitled to the same total amount under the 1975 contracts. Nor is the improvement in quality inconsistent with the language of Section 5(b)(1), 16 U.S.C. (Supp. V) 839c(b)(1), or the statutory allocation that Congress created.

Section 5(d)(1)(B) of the Regional Act required the Administrator to offer the DSIs "an amount of power equivalent" to the amount to which they were entitled in their 1975 contracts.[19] The question be-

---

[19] "Amount of power" as the term is used in the Regional Act and the 1975 contracts is a term of art. Section 4(a) of the 1975 contracts is entitled "Sale of Power and Amount Sold", and describes the maximum load size for each DSI as measured in "kilowatts" of power (capacity). Pet. App. N-2.

The Regional Act directs that the "amount of power" sold to each DSI remain constant. However, recognizing that sales to the DSIs would off-set the cost of the IOU residential exchange, Congress limited the conditions under which this power could be subject to restriction, or interruption. The

fore the Administrator, as he perceived it, was how to construct new contracts that implemented Section 5(d)(1)(A)—which requires that the sales to DSIs "shall provide a portion of the Administrator's reserves for firm loads within the region"—in a manner consistent with the definition of "reserves" in Section 3(17) as "electric power needed to avert particular planning or operating shortages for the benefit of *firm* power customers" (emphasis added). The Administrator interpreted these provisions to mean that "service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy." The court of appeals rejected

---

1975 agreements provided in General Contract Provision 8(b) that the "top quartile", or 25% of the DSI load, could be interrupted "at any time". Pet. App. N-5. This permitted interruption to serve requests by BPA's preference customers for non-firm service.

The Regional Act altered this unlimited right of interruption by providing that sales to the DSIs provide "a portion of the Administrator's reserves for *firm* loads within the region." 16 U.S.C. (Supp. V) 839c(d)(1)(A). The fact that such interruptions are only available for the purpose of serving firm loads is also supported by the Act's definition of "reserves." "'Reserves' means the electric power needed to avert * * * shortages for the benefit of the firm power customers of the Administrator and available to the Administrator * * * from rights to interrupt * * * as provided by specific contract provisions, portions of electric power supplied to customers." 16 U.S.C. (Supp. V) 839a(17).

The new contracts are faithful to the statutory directives and to legislative intent. The House Commerce Committee Report, recognized by the Senate as authoritative with respect to the "amount of power" question, notes: "The amount of power the DSIs are entitled to receive under these initial contracts is expressed in 5(d)(1) in terms of an entitlement under their present contracts rather than in terms of the amount of power being used at a particular time." H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 61; Pet. App. D-121 to D-123.

the Administrator's conclusion, holding that the power comprising the "top quartile" was never allocated and therefore may be interrupted both for firm and nonfirm loads. This holding significantly increases the risk that DSIs will be deprived of approximately 25% (the "top quartile") of their statutory power entitlements, since it is interruptible almost at the whim of preference customers.

3. The legislative history is abundantly plain, however, that Congress intended to insure that the DSIs received their full power entitlement, while providing that the "top quartile" of that power would serve as a reserve to avert shortages incurred by BPA in supplying firm power to other customers. As initially considered by the 95th Congress, the bills proposed to allocate a specific number of megawatts to each class of customers. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 17; *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess., Pt. I, 15 (1978). These bills were not reported out of committee. Later in that session, the House held hearings on another bill, H.R. 13931, which contained a section (5(c)) that provided: "The Administrator is authorized to sell to direct-service industrial customers electric power to meet their *load requirements* so long as such sales provide a portion of the planning and operating reserves for the Federal Columbia River power system." *Pacific Northwest Electric Power Issues: Hearings on H.R. 13931 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 11 (1978) (emphasis added). H.R. 13931 also died in committee, but bills containing this same provision for DSI sales were reintroduced in the 96th Congress.

Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 10 (1979); *Pacific Northwest Electric Power Planning and Conservation Act: Hearings on S. 885 Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 2d Sess. 12 (1980). By expressing the entitlement in terms of each customer's *full load requirements*, these bills would avoid intra-class disputes over power allocations. It is significant that no distinction was made with respect to how the load had been served, whether or not with interruptible power.

When S. 885 was reported by the Senate Committee, the provision for sales to the DSIs was changed to language quite close to the provision that was ultimately enacted. The Administrator was authorized to sell electric power to DSIs (S. Rep. No. 96-272, *supra*, at 5; Pet. App. F-11 to F-12:

> which have contracts * * * so long as such sales provide a portion of the reserves for firm power loads within the region. To effectuate the purposes of this subsection the Administrator shall offer * * * such customers an amount of power equivalent to * * * present industrial firm contracts. The offer and execution of these initial new contracts shall be deemed to be supported by a sufficiency of electric power available to the Administrator.

See S. Rep. No. 96-272, *supra*, at 28; Pet. App. F-56 to F-57. The version of S. 885 reported by the Committee was more specific in that "load requirements," which could expand, became an "amount of power" that was required to be offered and was tied to the existing contracts, which recorded each DSI's amount of power. This provision was split into Sections

5(d)(1)(A) and (B) and 5(g)(7) by both House Committees that issued reports. H.R. Rep. No. 96-976 (Pt. I), 96th Cong., 2d Sess. 11-12 (1980) (Commerce); *id.* (Pt. II), at 11-12 (Interior); Pet. App. D-25 to D-30, E-29 to E-32. While the House version was more precise (by more carefully identifying the exact contract documents to which reference was made), it was not regarded as materially different from the Senate bill. After conference, the Senate yielded to the language adopted by the House. 126 Cong. Rec. S14690 (daily ed. Nov. 19, 1980). Thus, a review of the evolution of the DSI sales provisions shows that Congress at all times considered legislation that would permit sales of the DSIs' full load requirements.

4. In addition, numerous statements were made during the congressional hearings demonstrating that, consistent with the language of the various bills, Congress intended to subject the DSIs' sales only to specific, *limited purpose* interruptions that would promote the overall goals of the Act. When Congress was considering a statutory plan for allocating BPA power, the DSIs' contracts were scheduled to expire between 1981 and 1991. The DSIs were willing to "trade-in" their existing contracts for BPA power at lower rates for new long-term contracts and they were willing to pay an immediate increase of 300% to finance the residential exchange program. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 177 (remarks of Edgar Kaiser). The DSIs were also willing to have their power interrupted, but only to serve certain regional purposes, namely, ensuring that "region[al] utilities will continue to enjoy secure sources of firm power for their customers" (*id.* at 225-226 (remarks of John Holtzapple)). These expressions of views on the terms of interruption of power provided

the background for Congress' eventual determination that BPA's ability to interrupt the DSI load would insure the local utilities' *firm power* needs. The clear understanding of the participants was that BPA would provide power to the DSIs *if BPA had the power. Id.* at 225. During peak periods of exceptional consumption, *i.e.*, when BPA runs out of power (not simply when another customer, whose contractual entitlement is already being met, demands more), the DSIs would be interrupted, but not otherwise.

Because it would be interrupted only under limited circumstances of resource or planning failure, the part of the DSIs' load that could be interrupted was regarded as having much higher quality than some unallocated surplus energy. The emphasis was clearly on the provision of a reliable long-term supply. For example, an Oregon state legislator gave this testimony on his understanding of the program (*House Hearings on H.R. 9020*, Pt. III, *supra*, at 17):

> The direct service industrial customers would give up their present low-cost electricity, but, in turn, would receive assurance of a firm electrical supply with which they could make long-term plans necessary for economic and employment security in my district and our region.

A company cannot, of course, make long-term plans with a power supply that may be interrupted by another customer's unpredictable, economically-motivated request.

Another indication that the DSIs' interruptible portion was not the equivalent of a bloc of unallocated nonfirm energy is provided in a staff memorandum to Chairman Jackson summarizing the effects of the bill. *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 and S. 3418*

Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Pt. II, 836 (1978). That memorandum stated (*id.* at 838 (emphasis added)):

> (d) BPA will be authorized to sell power *to meet DSI load requirements* if such sales provide a portion of BPA's planning and operating reserves. * * *
>
> (e) Any *other* power available on BPA's system will be sold within and without the region as is presently provided under law.

5. Moreover, as the Administrator observed in his opinion, the committee reports of both houses provided specific reference to the DSI contracts and the manner in which those sales would provide the reserves. The Senate Report contains an explanation of the section dealing with DSI sales (Pet. App. F-57; emphasis added):

> The *power quality* provided the direct-service industries *is determined by the reserve obligations set forth in their contracts in order to protect the firm loads of the Administrator.* It is intended that these contracts *at least* provide peaking power reserves similar to those provided in the present contracts, and that *the energy reserves shall include a reserve approximately equal to 25 percent of the direct service industrial load to protect firm loads* for any reason, including low or critical streamflow conditions, and an additional energy reserve of approximately the same amount to protect firm loads against delayed completion or unexpectedly poor performance of regional generating resources or conservation measures, and against unanticipated growth of regional firm loads. * * *

An Appendix to the Report contains this further explanation (Pet. App. F-74):

> This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical stream-flow conditions to carry 75 percent of the total DSI requirements. *The balance would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.* The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load). Further, in actual operation DSI power withdrawn or curtailed in excess of interruptions for critical streamflows would be replaced by power purchased by BPA on a short term basis, if available.

Later, the House Interior Committee Report accompanying the version of S. 885 that became law

contained these explanations (Pet. App. E-91, E-106 to E-107):

> Section 3(17) defines "reserves," which represent power available to protect firm loads from various shortage or operating situations. BPA obtains a portion of its power system reserves through rights to curtail power deliveries to direct-service industries; the term is also used in section 6(h) with respect to calculation of billing credits for BPA's customers.
>
> * * * * *
>
> The DSIs will also provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional 25 percent of the DSI load will be treated as a firm loan [sic] for both planning purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

The source of this language in the House Interior Committee report is significant. As S. 885 reached the mark-up stage after hearings, BPA conferred with the Interior Committee's staff (Pet. App. I-1). At the Committee's request, BPA provided its under-

standing of how the DSI rates would operate and the House Report incorporates the agency's explanation (*id.* at I-23) virtually verbatim. See note 10, *supra.*

Because the Senate and House explanations were expressed somewhat differently, an effort was made to avoid any potential dispute. While the Senate was considering adopting the House version of the bill, Senators Jackson (then Chairman of the Committee on Energy and Natural Resources) and McClure (the present Chairman) rose to state that the House Interior Committee Report accurately stated the operation of DSI reserves. 126 Cong. Rec. S14691, S14698 (daily ed. Nov. 19, 1980).

In sum, the DSI sales, as a part of the "Sale of Power" provision of the Act, evolved into highly specific understandings. The unusual particularity with which Congress addressed the allocation of power reflects the primacy of that issue as well as the underlying legislative desire to eliminate allocation disputes. As one Member remarked (126 Cong. Rec. H10678 (daily ed. Nov. 17, 1980) (remarks of Rep. Duncan)):

> It is said that this bill will not prevent litigation. That is certainly true. There may be litigation over rates, over new resources, and over the meaning of many provisions that have been added to the bill largely in order to reassure the bill's critics. But the key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.

After reviewing this legislative history, BPA incorporated the express terms of the House Report into its contract offers (Contract Offer Section 8(a) (Prin-

ciples), 46 Fed. Reg. 44385 (1981)) and adopted other provisions to implement these principles elsewhere in the contract.

C. BPA's Interpretation Of The Regional Act Is Consistent With Preference Requirements And Advances The Policies Of The Act

1. Federal hydroelectric power is sold by contract; DSIs, which consume large quantities of electricity and must plan for availability, have historically purchased power under long-term contracts. While Section 5 of the 1937 Act, 16 U.S.C. 832c, requires that preference be given to the applications of public bodies and cooperatives, a lawful long-term sales contract with a DSI customer commits the agency until the contract expires. If this were not the case, the request by a preference customer to purchase power sold to a DSI customer would require immediate interruption of up to the full contractual amount.[20] Just as continued sales to the DSIs under their old contracts was not a violation of preference policies, extended sales to the DSIs until the expiration of new long-term contracts directed by Congress would not "alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which

---

[20] If one accepts the public utilities' argument that the preference clause is absolute in all circumstances, then at least three quartiles of power bought by the DSIs would have been sold in violation of the preference requirements. Congress, however, acted on the understanding, articulated by the DSIs and BPA, that the outstanding 1975 contracts would require BPA sales to some DSIs until 1991. Only when these contracts expired could there be competing applications. Thus, even in the circumstances that existed under the 1937 Act when Congress revisited the statutory scheme, sales to DSIs were, in part, firm.

public bodies and cooperatives are entitled to preference * * *" (Section 10(c), 16 U.S.C. (Supp. V) 839g(c)). Only the sale of power to nonpreference customers not sanctioned by a lawful contract would violate historic preference entitlements.

2. The decision of the court below does not add to the preference policies brought forward by Congress and will undermine the Administrator's ability to utilize BPA power sales to achieve the optimum benefits intended by Congress under the Regional Act. Congress was willing to continue to sell federal hydroelectric power to the DSIs, beyond BPA's expiring contractual obligations, in return for higher rates that would finance broader access among residential customers to low-cost federal power. The underlying purpose of the federal policy to sell to non-profit preference customers was to spread the benefits of the federal dam facilities to the citizens of the region. To that end, Congress adopted a residential exchange program to spread the financial benefits of BPA power to many more people than sales limited to preference customers could provide. The Administrator observed that improved DSI "first quartile" power quality would further enhance the agency's ability to perform this goal.

Another important reason for continued sales to the DSIs was to take advantage of their ability to provide reserves for the firm loads in the region. DSI power deliveries can be interrupted, and the ability to close down deliveries to the DSIs enables BPA to meet its commitments to other customers with less generating capacity. This serves to lower BPA power costs as well as to further the conservation goals of the Act. Indeed, the court of appeals conceded (Pet. App. A-13) that "BPA's policy may serve the preference clause * * *."

3. The court of appeals' interpretation of the Regional Act will create anomalous results that Congress did not intend. Section 5(b) of the Act, 16 U.S.C. (Supp. V) 839c(b), affords all preference customers in the region, both past and future, BPA power to meet firm loads net of their own (or contractually acquired) generation capacity. There has been no suggestion that BPA has offered the preference customers anything less. The issue here is the ability of the preference customers to require that the loads of other customers be interrupted whenever demanded so that preference customers could obtain more power than they were allocated by Congress. Since they already have power resources to meet their needs, the preference customers will either (1) shut down their own generation resources (or cancel scheduled deliveries) or (2) resell the power to a third party—perhaps to one of the DSIs at a higher rate—even one outside the region that is supposed to benefit from BPA power. If this occurs, it would mean that, contrary to Sections 5(d)(1)(A) and 3(17), sales to the DSIs are interrupted for purposes other than use as a reserve for the firm loads of the region and other than to avert planning or operating shortages. In that event, BPA would have to acquire more generation capacity than otherwise would be needed, in conflict with the conservation policies of the Regional Act (Section 6).[21]

In short, the court of appeals' opinion is at odds with the statutory language that requires BPA to

[21] We also note that the interpretation of the court below renders the structure of the Act unnecessarily complicated. There would have been no need for Sections 5(d)(1)(A) and 3(17) if the "first quartile" could be interrupted upon demand, for there would be no reason to state that the DSI portion should serve as a reserve for firm loads.

offer DSIs an amount of power equal to the amount to which they were entitled under their 1975 contracts. The decision is also in conflict with the legislative history, which reveals a careful weighing of competing interests that resulted in a delicate balance assuring that all customers who were entitled to purchase from BPA would receive the amount of power Congress allocated. Finally, the action of the court of appeals cannot be reconciled with established principles of judicial review. The court below has substituted its own view for the carefully considered judgment of the expert agency Congress entrusted with the responsibility of implementing the Regional Act's plan of allocation.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

HARVARD SPIGAL
Acting General Counsel

LOUIS F. CLAIBORNE
Deputy Solicitor General

JAMES O. LUCE
Acting Assistant General Counsel

JERROLD J. GANZFRIED
Assistant to the Solicitor General

Bonneville Power Administration

ROBERT S. GREENSPAN
BRUCE G. FORREST
Attorneys

LARRY R. ROWE
Attorney
Department of Energy

JULY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 410178 23